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NOTES

TIME LIMITATIONS UNDER THE ARBITRATION LAW

The adoption of the New York Arbitration Law\(^1\) some 33 years ago was a basic reversal of the public policy of the state with reference to that extra-judicial method of settling disputes between contracting parties. At early common law, the courts looked with disfavor upon arbitration proceedings as ousting them of their inherent jurisdiction over the enforcement of contractual rights.\(^2\) It was therefore a great step forward when the courts permitted the enforcement of executed arbitration awards\(^3\) even while continuing to show disapproval by refusing to grant specific performance of executory contracts to settle disputes by arbitration.\(^4\) Bearing in mind the principle that the law favors the amicable settlement of controversies without resort to litigation,\(^5\) and realizing that an enforceable system of arbitration would substantially ease the volume of litigation continually burdening the courts, the New York legislature saw fit to enact into one compact article of the Civil Practice Act\(^6\) a just and workable means of achieving those aims.

In a manner parallel to, and complementary with, similar provisions of the Civil Practice Act relating to actions at law and in equity, the legislature enacted a series of time provisions, limiting the period within which arbitration may be demanded or enforced, awards may be confirmed, vacated, modified or corrected, service of notice will be effective, or jury trials of specified issues can be required. A survey of the reported cases interpreting the arbitration law since its enactment shows that a surprising volume of litigation arises out of the conflict as to the meaning and effect of the aforementioned limitations. Coupled with these statutory limitations are those adopted by the contracting parties, the effect of which has up to the present

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1. Laws of N. Y. 1920, c. 275.
3. See Brazill v. Isham, 12 N. Y. 9, 15-17 (1854).
been uncertain and conflicting in the various courts of the state. A third type of limitation is that imposed by the court itself and exercised out of its inherent equity powers. These are the limitations of laches and waiver applied by the court whenever strict adherence to the literal terms of the contract would place one of the contracting parties in an inequitable position as a result of fraudulent or unconscionable activity of the opposite party. It will be the aim of this note to elucidate fully upon these three types of limitations—statutory, contractual and court-applied—and to synthesize a working rule to be applied by the practitioner when confronted with such provisions in arbitration cases.

**Statutory**

The first time provision confronting the contracting party is that requiring eight days' written notice of an application for a court order directing arbitration. Such application is the remedy available to a party who wishes to avail himself of an arbitration provision in the contract where the opposite party neglects, refuses or otherwise fails to perform the contract or to submit the resulting controversy to arbitration. This remedy is perhaps the most fundamental distinction between the statutory and common-law forms of arbitration since it permits the enforcement of an executory arbitration contract which was impossible at common law.

If the defaulting party contests the application for the order directing arbitration, he may, upon the hearing, set forth facts tending to show that no contract was made or that there has been no failure to comply with the contract. If the evidence adduced raises a substantial question as to these issues, the court will direct a trial of the same. At this point, a second time limitation is applicable. In the absence of a timely demand to the contrary, the court alone will hear and determine the issues. But where the issues have been raised, any party may within five days after service of the order directing a trial of the issues, demand that a jury trial be had, and in such case, the court will refer the issues to a jury in the manner provided by law for the reference to a jury in equity actions.

In the event that the court or jury finds that there was a contract and that there has been a failure to comply with it, the court will then order the reneging party to proceed to arbitration. At this point, the arbitrators for the first time begin to function. It is their duty to nominate a time and place for the hearing, either in accordance with the terms of the contract, or, if none be specified, then by majority vote. If the arbitrators refuse or fail to do so, the court

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7 *Id.* § 1450.
9 *Id.* § 1454(2).
may direct that they proceed promptly with the hearing.\textsuperscript{10} In order that neither party be subjected to a default award through fraud or inadvertence, the statute enacts a third time provision requiring five days' written notice of the beginning of hearings to be served personally or by registered mail upon both parties.\textsuperscript{11} It would appear that failure of the arbitrators to cause such notice to be given will deprive them of jurisdiction, and render the award void upon timely objection by the aggrieved party.

Frequently, however, a party who believes that he is bound by no arbitration contract, or that there is no controversy to be settled, will ignore a demand for arbitration tendered by his opponent, and he may likewise boycott the arbitration hearings instigated by the latter. In doing so, however, with full knowledge of the proceedings, he places himself in the precarious position of being bound by a default award if he should fail to object timely to the arbitration. This he may do in two ways—first, by a motion for a stay of the proceedings, or, second, in opposition to a motion to confirm.\textsuperscript{12} But in order to protect a bona fide claimant from the expense of conducting arbitration only to find that the defaulting party successfully raises the issues of no contract or no failure of performance late in the hearings or even upon the motion to confirm, the statute provides limits upon that right.\textsuperscript{13} It states in substance that if a notice of intention to arbitrate be personally served upon the defaulting party, then those issues can only be raised by a motion to stay, notice of which must be served within ten days after service of notice of intention to arbitrate. It has been held that this time requirement is in the nature of a statute of limitations and that failure to serve such a notice within the ten-day period will preclude the petitioner from thereafter putting in issue the making of the contract.\textsuperscript{14} On the other hand, while an application for a stay was denied for non-compliance, the court did so without prejudice to petitioner's right to open his default upon a showing of the existence of merits and a good excuse for the default.\textsuperscript{15}

In 1939, the Court of Appeals in the leading case of \textit{Schafran & Finkel, Inc. v. Loewenstein & Sons, Inc.}\textsuperscript{16} reversed the Appellate Division\textsuperscript{17} judgment which had barred the petitioner from putting in issue the making of the contract where he had not, within ten days

\begin{thebibliography}{9}
\item Id. § 1454(3).
\item Id. § 1454(2).
\item Id. § 1458(2).
\item ibid.
\item 280 N. Y. 164, 19 N. E. 2d 1005 (1939).
\item 254 App. Div. 218, 4 N. Y. S. 2d 693 (1st Dep't 1938).
\end{thebibliography}
after notice of intention to arbitrate, served a motion to stay. The court stated that such an interpretation of the statute would be violative of the Fourteenth Amendment in that the notice of intention to arbitrate did not sufficiently apprise the respondent of the result of his failure to act. The court, therefore, granted petitioner relief in equity. As a result of this decision and of two cases following it that same year, the legislature undertook to correct this defect by an amendment which required that the notice, in order to effectuate its purpose of requiring the respondent to raise the issues within ten days or not at all, should substantially state the consequences of failure to act. Not until 1946 was the statute again attacked, at which time it was held by a unanimous court that the amendment successfully satisfied the requirements of due process. Failure of the party seeking arbitration to comply with the amended statute will render the preclusionary feature of the statute void and permit the objecting party to raise the issues even as late as the motion to confirm. As observed supra, where the issues are raised at the hearing of the motion for an order directing arbitration pursuant to Section 1450, any party may demand a jury trial of the issues within five days of an order directing a trial of them. Similarly, where the issues are raised by a motion to stay or upon motion to confirm, either party may demand a jury trial of the issues and by a 1953 amendment, the time for so demanding has been brought in line with that designated in Section 1450.

Assuming, then, the execution of a contract, the existence of an arbitrable controversy and the jurisdiction of the arbitrators, the validity and effect of the award must be considered. It should be noted that in order to enforce a statutory award, not only must the award be in writing, but it must be subscribed by the arbitrators within the time limit specified in the contract or submission. It has frequently been held that such a limit is not a basic part of the contract and may therefore be substantially, rather than literally, complied with. The theory behind such a position is that to deny enforcement of an award, concededly valid when made, merely because

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19 Laws of N. Y. 1939, c. 573.
22 See note 8 supra.
23 N. Y. Civ. PRAC. ACT § 1458(2).
24 Laws of N. Y. 1953, c. 558.
25 N. Y. Civ. PRAC. ACT § 1460.
26 Hegeberg v. New England Fish Co., 7 Wash. 2d 509, 110 P. 2d 182 (1941), and cases cited therein.
the arbitrators failed to subscribe it within the exact time limit, although within a reasonable time, not only would frustrate the probable intention of the parties, but would also cause a waste of the time and expense of the arbitration proceeding. It appears, however, that in New York, the courts would demand strict literal compliance with the statute. While no reported case directly on this point can be found, language used by the Court of Appeals in Matter of Broadway-40th St. Corp. (Manhattan Co.)27 would suggest such a position. There the court was dealing with a contract requiring an award to be made not later than October 1, and the petitioner failed to request arbitration until November 19. In denying petitioner's request, the court stated that since no valid award could be made under such circumstances, petitioner was not entitled to an order directing arbitration. But since in that case there was a gross variance between the contract limitation and the date on which arbitration was actually demanded, a serious question of laches and waiver was present and thus the case may not be determinative of a situation in which the variance was de minimis and otherwise reasonable. In fact, it has been held that where one party so acts as to prevent the arbitrators from rendering a decision prior to the contract date, he is deemed to have waived the requirement and will be ordered to proceed with arbitration.28

In order that the award may be enforced, judgment must be entered thereon after it has been confirmed, modified or corrected by order of the court.29 The statute, however, places certain limits upon the time during which such orders may be obtained. Pursuant to the 1953 amendment30 of Section 1461, a motion to confirm the award must be made by any party to the contract within one year after the filing or delivery of the award. Similarly, notice of motion to modify or correct the award, as well as to vacate it, must be served upon the adverse party within three months after the award is filed or delivered.31 While there have been no reported cases interpreting the one-year requirement of Section 1461, it has been conclusively established that the three months' requirement of Section 1463 is in the nature of a statute of limitations, the provisions of which may not be disregarded.32

30 Laws of N. Y. 1953, c. 570.
In an effort to circumvent the force of such a unanimous line of holdings, it was urged that this limitation applied only to motions to vacate, modify or correct the award. In the companion cases of Dick's Restaurant & Bar v. Rosenwasser and Matter of Owen-Davis Stores, Inc. (Wallenstein), this argument was squarely placed before the Supreme Court of New York County. In the Rosenwasser case, the defendant moved to dismiss the plaintiff's action to vacate the award on the ground that plaintiff was remitted solely to his remedy under Section 1463, and since he failed to move to vacate the award within three months, he could not then seek relief in an action at law. The court denied defendant's motion and stated that since no valid award was made, but only a fabricated arbitration to defeat the Emergency Rent Laws, plaintiff would not be barred from bringing an action to correct the wrong so as to carry out the purpose of the circumvented laws. Upon appeal, the order was affirmed unanimously but with the caveat that the court did not wish to indicate what, if any, relief plaintiff could have. In the Wallenstein case, decided by the same court, and dealing with a controversy identical with that treated in the Rosenwasser case, petitioner's motion to vacate the award was denied. The court distinguished its earlier holding by stating that since the instant case decided a motion, it was bound by the long line of decisions holding Section 1463 to be a statute of limitations. But since the Rosenwasser case involved a plenary action, the mentioned section was inapplicable and no limit other than that indicated in Article 2 of the Civil Practice Act applied.

This fiction, however, was short-lived. In the case of Raven Electric Co. v. Linzer, the Appellate Division in the First Department followed the reasoning of the Rosenwasser case. Upon appeal, however, the Appellate Division was reversed by the Court of Appeals. There it was held that the only way to vacate an award is by motion pursuant to Section 1463 and that the three months' limitation cannot be obviated by bringing a plenary action to vacate the award. It has likewise been held that even where fraud and


38 See note 32 supra.

37 275 App. Div. 1032, 92 N. Y. S. 2d 405 (1st Dep't 1950).

36 302 N. Y. 188, 97 N. E. 2d 746 (1951).

35 Accord, Estro Chem. Co. v. Falk, 303 N. Y. 83, 100 N. E. 2d 146 (1951); Feinberg v. Barry Equity Corp., 277 App. Div. 762, 97 N. Y. S. 2d 570 (1st Dep't 1950), aff'd mem., 302 N. Y. 676, 98 N. E. 2d 480 (1951); Laurel Print-
corruption is charged, Section 1463 is the exclusive remedy\footnote{Matter of Mayo Realty Corp., 68 N. Y. S. 2d 843 (Sup. Ct. 1947).} and that exception and appeal is an improper and ineffectual method of attacking or reviewing an award.\footnote{Matter of Wilkins, 169 N. Y. 494, 62 N. E. 575 (1902).}

The only exception provided by the statute to the time requirements for the bringing of a motion to confirm, vacate, modify or correct an award is that found in Section 1468. This provision permits a judge of the court to make an order extending the prescribed periods whenever a party dies after making a submission or contract of arbitration and it is begun or continued by his executor or administrator or other lawfully designated persons. This provision brings the arbitration statute into line with the pertinent non-abatement provisions of the Civil Practice Act for the survival of actions at law.\footnote{N. Y. Civ. PRAC. ACT §§ 82, 84, 85, 86, 88, 89, 476, 1131; see also N. Y. DEC. EST. LAW § 118.}

\textbf{Contractual}

Statutes of limitations represent the legislative determination of the maximum time within which actions may be commenced. Their purpose is several: to prevent the enforcement of stale claims; to outlaw actions slept on until witnesses are dead, testimony forgotten and evidence obscure.\footnote{See Chase Securities Corp. v. Donaldson, 325 U. S. 304, 314 (1945).}\footnote{See Schmidt v. Merchants Despatch Transp. Co., 270 N. Y. 287, 302, 200 N. E. 824, 827 (1936); Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 213, 4 N. Y. S. 2d 640, 642 (4th Dep't 1938).} Such statutes have been characterized as statutes of repose\footnote{See Campbell v. Holt, 115 U. S. 620, 625 et seq. (1885).}\footnote{N. Y. CIV. PRAC. ACT § 10.} which, without affecting the right, deny the remedy.\footnote{70 N. Y. S. 2d 476 (Sup. Ct. 1947).} The New York statute\footnote{Accord, Matter of Shine’s Restaurant (Waiters and Waitresses Union), 127 N. Y. L. J. 1017, col. 4 (Sup. Ct. Mar. 13, 1952).} provides that the limitations shall apply except in those cases where a different period is prescribed by law or where a shorter limitation is prescribed by the written agreement of the parties. It may thus be seen that contractual provisions may effectively shorten the period within which an action may be commenced. The effect of such provisions in arbitration contracts has for many years been the source of much litigation. The decisions of the courts have been by no means harmonious, and may be reduced to three general categories. The first leading case on this subject is \textit{Application of Ketchum & Co.},\footnote{70 N. Y. S. 2d 476 (Sup. Ct. 1947).} decided in 1947, which is typical of the view that such provisions are in the nature of statutes of limitations which must be strictly enforced.\footnote{Accord, Matter of Shine’s Restaurant (Waiters and Waitresses Union), 127 N. Y. L. J. 1017, col. 4 (Sup. Ct. Mar. 13, 1952).} In the very
same year, this precise question again came before the courts in two cases which established what might be called the middle view. It was argued in one of these cases that the five-day period within which arbitration must be requested was a short statute of limitations, failure to comply with which barred an application to compel arbitration. In granting the application, the court stated that it was unable to adopt this contention and that in its opinion, the provision was merely a condition which need only be substantially complied with. The question of such compliance was one not for the courts, but for the arbitrators. In the other case, the court, facing a similar five-day limitation, held that the arbitration clause which provided that any controversy arising out of or in relation to the contract should be settled by arbitration was sufficiently broad to cover the controversy as to whether the demand for arbitration had been timely made. In the following year, the issue was first presented to an appellate court. In a per curiam decision, it was held that an arbitration clause which stated that all claims were to be made within ten days after receipt of goods was not a statute of limitations where a claim was made upon discovery of the defect some 27 days after receipt. In so holding, the court adopted the middle view when it stated that "whether the claim made by petitioners... should be allowed is a matter for determination by the arbitrators." In 1951, the third view was first definitively adopted in Matter of Constitution Square, Inc. Here the court was faced with a building contract which provided that demand for arbitration must be made within ten days after the arising of a controversy. Although no demand was made until 24 days thereafter, an application for compulsory arbitration was granted and it was held that the clause did not constitute a statute of limitations. Here the court itself con-

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50 Matter of Rabinowitz (Union News Co.), supra note 49.


52 Matter of Tuttman (Kattan, Talamas Export Corp.), 274 App. Div. 395, 83 N. Y. S. 2d 651 (1st Dep't 1948).


sidered the timeliness of the demand as opposed to those cases constituting the middle view which referred that question to the arbitrators.

Although no decisions have been reported out of the Third and Fourth Departments, it can be seen that confusion exists as to the effect of such provisions even within the First and Second Departments. Some observations are therefore in order. Where the parties have gone to the trouble of agreeing upon definite limitations, it is judicial contract-making to disregard the plain meaning of the writing and to hold that all that is required is substantial compliance. Those cases which adopt the position that such provisions are ineffective would therefore seem to be untenable. However, much can be said for the validity of the other two views. Whether the demand is timely made may logically be considered a controversy "arising out of or relating to" the arbitration contract, and where the contract contains such a broad clause, it is not unreasonable to hold that the determination of such an issue lies within the exclusive jurisdiction of the arbitrators. On the other hand, whether a party has made his claim or demand within a certain fixed period may be regarded as a simple question of fact and not a controversy within the meaning of the contract. Under such a theory, the jurisdiction of the arbitrators is dependent upon the timeliness of the demand, and only a court can determine such jurisdiction.

While the Court of Appeals has never been presented with this precise question, it may be profitable to examine analogous situations decided by that court. Matter of Lipman\(^5\) may well be cited by adherents of the middle view which holds that the question of timeliness, and indeed of jurisdiction, is a matter for the arbitrators themselves to determine. In that case, the parties executed a contract containing an arbitration clause. Subsequently, the parties executed a new contract which had no such clause and which made no reference to the earlier contract. Petitioner moved for an order directing arbitration and respondent contested on the ground that the subsequent contract had cancelled the earlier one together with its arbitration clause. Special Term granted the motion to the extent of ordering a trial to determine this question of law, and, if the prior contract was found not to have been cancelled, then to proceed to arbitration. The Appellate Division modified the judgment by granting the order absolutely,\(^6\) and upon appeal the Court of Appeals affirmed as modified. In so holding, the court implemented Section 1450 which requires an order directing arbitration where there is no substantial issue as to the making of the contract. Here the question was not as to the making of the contract, but rather as to its rescission. Therefore, the order to arbitrate must be granted and the

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\(^5\) 289 N. Y. 76, 43 N. E. 2d 817 (1942).
\(^6\) 263 App. Div. 880, 32 N. Y. S. 2d 351 (2d Dep't 1942).
question of whether the prior contract containing the arbitration
clause is in force or whether the subsequent one had rescinded it is
a matter for the arbitrators to decide under the prior contract which
provided that all controversies arising "out of" or "in connection
with" the contract be submitted to arbitration. Thus the arbitrators
themselves were given the task of deciding whether they had
jurisdiction.

A recent decision of the Court of Appeals in River Brand Rice
Mills v. Latrobe Brewing Co. 57 may well encourage proponents of
the strict statute of limitations view. Here the issue decided was
whether an action could be maintained on the contract at law after
an injunction had issued restraining complainant from proceeding
with arbitration. Answering this question in the negative, the Court
of Appeals in effect affirmed the Appellate Division's 58 recognition
of a Special Term holding that arbitration was barred by failure to
demand it within the five-day period. But if the proponents of the
view that such time limits are not statutes of limitations were dis-
heartened by the decision in the River Brand Rice Mills case, they
have cause to see in it a method of avoiding the harshness of such a
rule. The court there stated that upon a proper showing, it may be
held that the time limitation contained therein is so unreasonably
harsh as to be unenforceable. 59 This dictum is in sharp contrast to
the only other arbitration case which considered this point. In Matter
of Leo Crisafulli, Inc. 60 it was urged that an identical five-day period
was unreasonable and void. The court rejected the contention stat-
ing that "[a] limitation upon the right of arbitration is unlike one
upon the right to bring suit and the court is not to consider whether
the limitation is reasonable or unreasonable." 61 It would appear,
however, that this is an ill-decided case.

In determining the reasonableness of time limitations, we must
turn to other contractual fields, there being no arbitration cases other
than the Crisafulli case on the subject. Bills of lading and insurance
cases are especially illuminating. In these cases, a sharp distinction
is drawn between provisions which limit the time within which ac-
tions may be commenced and those which limit the time within which
notice of claim must be made as a condition precedent to the bring-
ing of an action. The importance of this distinction lies in the fact
that while limitations on the right to sue are looked on with disfavor, 62
those placed on the timeliness of notice of claims are considered valu-
able aids in apprising a defendant of the facts upon which he may

57 305 N. Y. 36, 110 N. E. 2d 545 (1953).
59 Supra note 57 at 41, 110 N. E. 2d at 547.
61 Ibid.
N. Y. S. 2d 42, 44 (Sup. Ct. 1948).
Consequently, what may be considered as a reasonable time within which to require a notice of claim may well be considered unreasonable when applied to the time within which to institute an action.

One of the earliest cases to consider this question was that of Express Co. v. Caldwell. There, the Supreme Court of the United States stated that a contractual stipulation in a bill of lading providing for a ninety-day limitation within which to make a claim was not a conventional limitation on the right to sue. The injured party is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within the designated period, and, having made it, he may delay his suit. This distinction has been recognized and followed in at least two New York Court of Appeals cases. In South & Central American Commercial Co. v. Panama R. R., it was observed in passing on the reasonableness of the limitation that “[w]e are not to confuse a limitation for a preliminary notice with one for the institution of suit.” Similarly, the court in Aron & Co. v. Panama R. R. expressed the caveat that this distinction should be kept in mind.

Despite the existence of these definitive statements of the Court of Appeals prior to the first reported arbitration case dealing with contractual limitations, only one such case has ever made reference to the distinction. In Matter of Raphael (Silberberg), the limitation was one on the making of a claim and the Appellate Division held that such a limitation was in the nature of a condition precedent rather than a statute of limitations, and hence the question of compliance was strictly one for the determination of the arbitrators. A logical deduction from this holding would be that if the limitation were one on the time within which arbitration must be demanded or initiated, then it would be in the nature of a statute of limitations which is a matter of defense to be considered exclusively by the court. Such a theory would be in full agreement with the overwhelming majority of cases in the bill of lading and insurance fields. Of the twelve other cases, the opinions of which specify the type of limitation involved, nine reach the results which would be obtained if the above thesis were adopted as the applicable rule of law. It is sub-

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63 See Express Co. v. Caldwell, 21 Wall. 264, 268-269 (U. S. 1874).
64 See note 63 supra.
65 237 N. Y. 287, 142 N. E. 666 (1923).
66 Id. at 292, 142 N. E. at 668.
68 Id. at 519, 175 N. E. at 275.
mitted that the propounded rule is logical and workable, and would eliminate the confusion now existing in the field of arbitration.

What is a reasonable time?

Whether we follow one or the other of the above-mentioned theories, whether we leave it to the court or to the arbitrators, it is necessary to form a basis for determining what is a reasonable time. Here again, the decisions have been by no means harmonious. As indicated supra, Section 10 of the Civil Practice Act specifically permits the adoption of shorter limitations than those enumerated in the statute. The courts have construed this provision to require in all circumstances a reasonable time, and if a shorter time prescribed by the contract is unreasonable, the clause is not binding. While the majority of states have no statutory provisions authorizing the making of such clauses, at least six states declare them void. It is interesting to note that the proposed Uniform Statute of Limitations Act declares that no agreement for a period of limitation different from that prescribed in the Act shall be valid. The apparent effect of such provisions is to declare shorter limitations unreasonable as a matter of law.

The early cases indicate that the courts were loath to declare contractual limitations unreasonable. But with the enactment of restrictions by the various states and by the Federal Government, the courts began to revise their concepts of what is or is not reasonable. Although as late as 1927 a 48-hour limitation on the time within which to file a notice of claim was held reasonable, generally periods of less than 30 days run great risk of being declared invalid. The

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73 Section 4. Although approved by the Commissioners, this statute has not yet been adopted by any jurisdiction.
75 Cudahy Packing Co. v. Munson S.S. Line, 22 F. 2d 898 (2d Cir. 1927)
Texas statute eliminates this uncertainty by declaring limitations of less than 90 days on the right to file notice of claim unreasonable as a matter of law. Limitations on the right to bring an action are correspondingly longer, but periods of less than three months would appear to be unreasonable. Here again, the Texas statute declares periods of less than two years invalid.

A survey of the pertinent cases indicates that the standard period designated in arbitration contracts for both types of limitation varies from three to fifteen days. These clauses are frequently found in contracts for the sale of textiles, foods and other merchandise intended to be processed and sold by the buyer to an ultimate consumer. In such contracts, five- or ten-day limitations are clearly unrealistic and would appear to be unreasonable. In Matter of Leo Crisafulli, Inc., it was argued that the limitation of five days was not intended to apply to a claim not ascertainable until after the product had been resold and used by the consumer for cooking purposes. The court rejected the argument stating that the parties were competent to contract for any limitation they saw fit, and that since the limitation is unlike one on the right to bring suit, the court is not to consider whether the limitation is reasonable or unreasonable. While not an arbitration case, Jessel v. Lockwood Textile Corp. would seem to formulate the proper rule to be applied to such a case. There the contract was for the sale of shirting goods, and contained a clause that no claims should be allowed after ten days or after the goods had been cut. In reversing the trial court which had disallowed the claim made after ten days and after the goods had been cut, the Appellate Division remanded the case to determine whether the defects were discoverable before the goods had been manufactured into shirts. It held that where the defects were latent, such a short claim period will not be conclusive.

In view of the Jessel case and the dictum of the Court of Appeals in the River Brand Rice Mills case, it is to be hoped that the gross disparity between the law applicable to arbitration and that

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78 See South & Central American Com. Co. v. Panama R. R., supra note 74 (60 days); The President Poll, supra note 74 (30 days); Green Star S.S. Co. v. Nanyang Bros. Tobacco Co., 3 F. 2d 369 (9th Cir. 1925) (3 months). But see The Eldridge, 295 Fed. 696 (W. D. Wash. 1924) (40 days); The Sagadahoc, 291 Fed. 920 (W. D. Wash. 1923) (2 months).


82 80 N. Y. S. 2d 607 (Sup. Ct. 1947).
applicable to other contractual fields will be diminished, and that a rule of reason will be implemented in disposing of cases brought under the Arbitration Law.

Laches and Waiver

Strictly speaking, the problem of laches and waiver does not properly come under the topic of time limitations due to the fact that time is only one of the many elements upon which these defenses are based. In discussing laches and waiver, the courts rarely distinguish between the two legal concepts and frequently use them interchangeably. Waiver, on the one hand, is a voluntary relinquishment of a known right and generally involves an affirmative act whereby the party against whom the waiver is invoked signifies his intention not to insist upon his rights. Laches, on the other, is a doctrine which precludes a person from exercising rights which he has failed to assert within a reasonable time, and the exercise of which would cause an unconscionable degree of harm to the person against whom the right is sought to be enforced. It is a judicial denial as distinguished from a voluntary relinquishment of one's rights, and is exercised by the court out of its inherent equity power to prevent injustice.

Acquiescing in the court's all-inclusive use of the term waiver, arbitration cases involving this defense may generally be reduced to three categories:

1. waiver caused by refusal to arbitrate;
2. waiver caused by election of remedies; and
3. waiver caused by delay (more properly, laches).

Refusal to arbitrate upon due demand of the opposite party has been held to constitute a waiver. It may well be, however, that refusal to arbitrate is, in effect, an election of remedies and hence may be treated under that heading. The question is, in all cases, one of degree and intent. How far one can go without waiving his right is determined by the specific factual situation, but, as in all factual determinations, there are maximum and minimum areas where the law has become quite crystallized. Thus, with few exceptions, the

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86 See Matter of Cia. Naviera Veragua S. A., 129 N. Y. L. J. 381, col. 1 (Sup. Ct. Feb. 3, 1953) (held that although petitioner had brought suit in
initiation of an action at law on a matter embraced by the arbitration contract is a waiver of one's right subsequently to abandon the action and proceed to arbitration.\textsuperscript{87} Similarly, the assertion of a cross-complaint \textsuperscript{88} or a counterclaim \textsuperscript{89} has been held to be such a waiver. Nor need this affirmative act be in the nature of an action at law. Although such a result has now been specifically excepted by statute,\textsuperscript{80} service of a notice requiring the respondent to enforce his rights at law within a period designated in the Lien Law \textsuperscript{91} was held to constitute a waiver.\textsuperscript{92}

More difficult, however, is the determination of whether the interposition of an answer constitutes a waiver. Although it has been held that the service of an answer alone would effect a waiver,\textsuperscript{93} it must be shown that the defendant had knowledge of the arbitration clause prior to answering.\textsuperscript{94} However, where the answer not only traverses the complaint, but sets up the existence of the arbitration clause, it has been held that such an assertion amounts to the reservation of the right to arbitrate and indicates an intention not to waive.\textsuperscript{95} On the other hand, the mere assertion of the arbitration clause in the answer will not preserve the defendant's rights where he has proceeded so far in the action that the assertion is inconsistent with his conduct in the matter.\textsuperscript{96} Thus, where the defendant attempted to evade the service of complaint by various motions, finally accepted service and then moved for change of venue, his actions were so inconsistent with the assertion of a right to arbitrate that a waiver was found.\textsuperscript{97} Similarly, where the defendant made a demand

Dutch court to preserve rights under contract, he is not deemed to have waived if Dutch action is promptly discontinued).


\textsuperscript{90} N. Y. LIEN LAW § 35.

\textsuperscript{91} Id. § 59.

\textsuperscript{92} Matter of Young v. Crescent Development Co., 240 N. Y. 244, 148 N. E. 510 (1925).


\textsuperscript{97} Goldschmidt v. Blum, 124 N. Y. L. J. 161, col. 4 (Sup. Ct. July 31,
for a bill of particulars, served a notice to take testimony, examined the respondent before trial and moved for a preclusion order, the court held that under such circumstances, it could hardly be held that the petitioner did other than waive its right to arbitrate even though asserting such right in the answer. But where the defendant moved for a dismissal or in the alternative that the alleged complaint be separately stated, no waiver was found since the defendant had the right to test the sufficiency of the complaint before an imperative duty of election arose.

An exception to the rule that service of an answer alone constitutes a waiver is found in the situation where the defendant serves, as of course, an amended answer alleging the arbitration contract. The reason for this exception lies in the fact that since the first answer was amendable at the will of the defendant within the time allowed in the statute, there could be no waiver until that period had expired.

A finding of waiver by means of laches may be justified by any unreasonable delay in making proper application for arbitration. Thus, where the respondent made no demand to inspect the petitioner's production records until 30 months after the expiration of a contract by which petitioner was to sell respondent 40% of its production, it was held that the unexplained delay in making the demand constituted laches and was a waiver of the contract. Similarly, a delay of six years in making a demand for arbitration was held to be a bar.

A finding of waiver by reason of election of remedies is frequently accompanied by a finding of laches since it is generally only after a defendant has been unable to resist the prosecution of an action at law that he will demand arbitration as a last resort. In Matter of Nathan Associates, Inc., the defendant served a notice for arbitration only after the City Court action in which he had been


100 Short v. Nat. Sports Fashions, Inc., 264 App. Div. 284, 35 N. Y. S. 2d 169 (1st Dep't 1942). But cf. Matter of Bauer Co., 206 App. Div. 423, 201 N. Y. Supp. 438 (1st Dep't 1923), where the plaintiff served his complaint, the defendant answered, the plaintiff amended his complaint and the defendant then made demand for arbitration. The court there held that the subsequent service of a demand for arbitration did not cure the defect of failing to allege the arbitration contract in the original answer, and hence the original waiver remained unaffected.


served appeared on the day calendar for trial, and several adjournments had been had at defendant's request. In denying defendant's application, Special Term characterized his actions as dilatory tactics and a waiver of the right of arbitration.\textsuperscript{1}

\textit{Conclusion}

The impartial prohibitions of a time limitation often preclude redress for a just claim through arbitration. When the legislature enacts a statute of limitations, thereby sacrificing individual justice to the needs of the majority, it must carefully weigh its decision in order that the time set is reasonable. Since contractual limitations have a similar effect upon bona fide claims, the courts should see to it that reasonable necessity and not caprice justifies their enforcement. In view of the confusion confronting the bench and the bar with respect to these contractual limitations, it would appear that an amendment to Section 1448 of the Civil Practice Act should be made. This amendment would state in substance that no agreement or contract shall be valid which limits the period within which notice of claim must be given, or a claim filed, to a period of less than 90 days. It is submitted that such a period is just and reasonable in every situation that might arise, yet would prevent such a limitation from being a mere cloak for denial of a remedy.

\section*{Some Problems of Dual Nationality}

\textit{Introduction}

Citizenship is regulated by municipal, rather than international law.\textsuperscript{1} Each nation forms its own rules as to the manner in which its citizenship may be acquired and in which it may be terminated. In determining a person's nationality at birth, some nations adhere to the doctrine of \textit{jus soli}, i.e., citizenship is determined by birth within the country. In others the status depends upon \textit{jus sanguinis}, i.e., nationality is inherited from the parents regardless of place of birth.
